IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL T. GOURLEY	:	**CIVIL ACTION**
	:	
v.	:	
	:	
HOME DEPOT	:	**No. 99-5728**

MEMORANDUM ORDER

This is an employment discrimination action. Plaintiff contends that he was denied a job by defendant in violation of the Americans With Disabilities Act ("ADA") and the Pennsylvania Human Rights Act ("PHRA"). Defendant has moved for summary judgment.

When considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. at 248. All reasonable inferences from the record are drawn in favor of the non-movant. Id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on

which he bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The non-moving party may not rest on his pleadings but must come forward with evidence from which a reasonable jury could return a verdict in his favor. Anderson, 479 U.S. at 248; Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

From the evidence of record, as uncontroverted or otherwise taken in the light most favorable to plaintiff, the pertinent facts are as follow.

Plaintiff suffers from hearing loss in his right ear and partial hearing loss in his left ear. He wears a hearing aid. He hesitates when speaking and reads lips to understand better what people are saying.

Plaintiff applied for a full-time kitchen and design position in the Kitchen and Bath Department of the Montgomeryville, Pennsylvania Home Depot store (the "Store") on November 17, 1997. He filled out an application at the Store and passed the required math and REID educational tests. Each Home Depot store has a store manager who has hiring and firing authority and six assistant store managers who handle job applicants for particular departments. The Store is divided into fifteen departments, including the Kitchen and Bath Department (the "Department").

On November 19, 1997, Jeff Johnson, the Assistant Store Manager in charge the Department, called plaintiff's home to arrange an interview. Later that day, plaintiff called back Mr. Johnson to arrange the interview. The next day, Mr. Johnson interviewed plaintiff for a kitchen and bath design position in the Department. Mr. Johnson informed plaintiff that he appeared to be a strong candidate for the position and instructed him to take the required drug test and contact him in a week to set up a schedule and start the job.[1] Mr. Johnson told plaintiff that he was being hired for a kitchen and bath design position, but might be asked to work occasionally in the plumbing department.[2]

Plaintiff took the drug test on November 24, 1997. The results were negative for drug use. Shortly after Thanksgiving, plaintiff called the Store to speak to Mr. Johnson and was informed by the front desk that he was not in. The next day, plaintiff again called the store asking for Mr. Johnson. This time he was told that Mr. Johnson was no longer employed by Home

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[1]The Home Depot "Standard Operating Procedure" manual provides that defendant will only make an employment offer after the candidate passes the drug test.

[2]Ten to twenty persons on average were hired monthly store-wide. Defendant's Hiring Reference Guide provided that an applicant must be interviewed by the store manager before the applicant could be hired. At least in practice, it appears that assistant store managers could hire for departments under their supervision in the absence, or with the concurrence, of the manager. There is, however, no evidence of record that the Store manager was absent when Mr. Johnson offered a position to plaintiff or that he concurred in such action.

Depot. Mr. Johnson's employment had been terminated by defendant on December 2, 1997.

On December 7, 1997, plaintiff visited the Store and asked someone at the front desk to speak to the person in charge of the Department. A man then approached plaintiff who said that he was in charge of the Department. Plaintiff explained that he had been offered a position by Mr. Johnson. The man walked into an office with plaintiff. The man commented that he "notice[d] [plaintiff's] hearing aid" and asked plaintiff "how well [plaintiff] could hear." Plaintiff did not respond. The man asked plaintiff to fill out an application. Plaintiff told him that he had already filled out an application and taken the drug test. The man told plaintiff that he would attempt to find plaintiff's application, discuss the situation with his supervisor and then contact plaintiff. Plaintiff did not ask of otherwise learn the man's name. Defendant has no record of plaintiff's application.[3]

After two or three days passed without a call from the Store, plaintiff's wife called the Store and was told that Bill Barnish now was in charge of the Department. Plaintiff twice visited the Store, asking to speak with Mr. Barnish. Plaintiff

[3]Plaintiff states that Mr. Johnson now lives more than 100 miles from this district and "refuses to acknowledge" plaintiff's subpoenas. Plaintiff does not explain why he could not have subpoenaed Mr. Johnson for deposition in the district where he now resides and, if necessary, obtain an order to compel the deposition from the federal court in that district. See Fed. R. Civ. P. 45(a)(2) & (e).

was informed that Mr. Barnish was unavailable. On December 23, 1997, plaintiff called the Store and spoke with Mr. Barnish. Mr. Barnish told plaintiff that he did not recall previously meeting him.

Plaintiff claims that the person with whom he spoke on December 7, 1997 was Mr. Barnish.[4] Mr. Barnish is the Administrative Assistant Manager of the Store. He denies having "interviewed" anyone in November or December 1997. There is no record about whether he may have spoken with plaintiff before December 23, 1997, and for the purposes of this motion the court will assume that Mr. Barnish was the man with whom plaintiff spoke on December 7, 1997.

The Store did not hire anyone for the Department between December 2, 1997 and March 21, 1998. The Store hired six persons for the Department between March 21, 1998 and October 31, 1998, two in late March, two in mid-April and two in early June. Four of the six positions were full-time. A seventh hire, Walter Helm, had been terminated on November 16, 1997 from a full-time kitchen and bath design position. Defendant determined that he was improperly terminated and reinstated him on December 1, 1997.

[4]Plaintiff does not state the basis of this belief. He explained in his deposition that his wife called the Store, was informed that Bill Barnish was in charge of the Department and plaintiff then concluded that "I believed that was him."

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." See 42 U.S.C. §§ 12112(a). The same standards and analyses are applicable to plaintiff's ADA and parallel PHRA claim. See Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999); Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996).

Plaintiff relies on the McDonnell Douglas burden-shifting framework, applicable to claims for disability discrimination under the ADA and PHRA. See Lawrence v. National Westminster Bank N.J., 98 F.3d 61, 66 (3d Cir. 1996); McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996). Under this framework, plaintiff must first establish a prima facie case of disability discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). The burden then shifts to defendant which must offer a legitimate non-discriminatory reason for failing to hire plaintiff. McDonnell Douglas Corp., 411 U.S. at 802; Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000). If defendant offers a legitimate non-discriminatory reason, plaintiff must "demonstrate that the employer's stated reason was not its true reason, but merely a pretext for discrimination."

See Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 330 (3d Cir. 1995). Plaintiff must present evidence from which a fact finder reasonably could disbelieve the employer's articulated legitimate reasons, from which it may reasonably be inferred that the real reason was discriminatory, or from which one could otherwise reasonably conclude that invidious discrimination was more likely than not a motivating or determinative factor in the employer's decision. See Lawrence, 98 F.3d at 66; Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). A plaintiff may discredit an employer's proffered reason by showing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for the asserted non-discriminatory reasons." Id. at 765 (citations omitted).[5]

To establish a prima facie case of disability discrimination, a plaintiff must show that: he is in the protected category; he applied for and was qualified for a job for which the employer was seeking applicants; despite his

[5]The characterization of the injury as a revoked offer or as a failure to hire does not affect the analysis. See EEOC v. Sears Roebuck & Co., 243 F.3d 846, 851-56 (4th Cir. 2001) (using McDonnell Douglas framework when defendant revoked job offer); Kresge v. Circuitek, Div. of TDI, 958 F. Supp. 223, 225-26 (E.D. Pa. 1997) (same).

qualifications, he was rejected; and, after his rejection, the position remained open and the employer continued to seek applicants. See Olson v. General Elec. Aerospace, 101 F.3d 947, 951 (3d Cir. 1996).

Defendant contends that plaintiff is not in the protected category under the ADA and has not shown that defendant continued to seek applicants for kitchen and bath design positions after not hiring plaintiff.

A hearing impaired person can be a qualified individual under the ADA. See, e.g., Duffy v. Riveland, 98 F.3d 447, 455 (9th Cir. 1996); Davis v. Frank, 711 F. Supp. 447, 453 (N.D. Ill. 1989). To be so qualified, however, he must be significantly impaired in hearing, that is he must be "significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which an average person in the general population can perform the same major life activity." See 29 C.F.R. § 1630.2(j)(1)(i)-(ii) (1999). Courts must examine on a case-by-case basis whether an individual has presented evidence that the extent of the limitation is sufficiently substantial. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 566 (1999).

It is uncontroverted that plaintiff suffers from complete hearing loss in one ear and hearing loss which is

partially corrected in his left ear. Plaintiff reads lips to compensate for his hearing loss and hesitates in speaking.[6] Plaintiff has made a showing that he is sufficiently limited in hearing to qualify as disabled within the meaning of the ADA.[7]

Defendant also contends that plaintiff has presented no evidence of a vacancy on December 7, 1997 when he first spoke with Mr. Barnish and when, as plaintiff acknowledges in his deposition, the only alleged incident of discrimination occurred. Defendant offers uncontroverted evidence that it filled four full-time and two part-time kitchen and bath design positions at the Store between March 21, 1998 and November 1, 1998, and that no person was hired into the Department between December 2, 1997 after Mr. Helm was reinstated and March 21, 1998. Plaintiff argues that these were positions for which he should have been considered.

Plaintiff need not show that there was a vacant position on the exact date he applied. He may show that

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[6]Defendant correctly notes that plaintiff submits no medical evidence concerning hearing loss. The absence of such evidence, however, is not per se fatal to a plaintiff's prima facie case. The need for medical evidence depends on the extent to which the alleged impairment is within the comprehension of a lay jury. See Marinelli v. City of Erie, Pa., 216 F.3d 354, 360-61 (3d Cir. 2000). See also Colwell v. Suffolk County Police Dept., 967 F. Supp. 1419, 1425-26 (E.D.N.Y. 1997) (ADA does not require medical testimony to establish disability status), rev'd on other grounds, 158 F.3d 635 (2d Cir. 1998).

[7]Hearing is a major life activity within the meaning of the ADA. See 29 C.F.R. App. § 1630.2(i).

defendant had a vacancy within a reasonable time after his application. See Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (vacant positions include those currently vacant or that the employer reasonably expects will become vacant in the "fairly immediate future"); EEOC Compliance Manual, p.39 (a position is vacant for ADA reasonable accommodation purposes if it is vacant when the covered employee requests reassignment or if the employer knows the position will become vacant within a reasonable time). See also McLean v. Phillips-Ramsey, Inc., 624 F.2d 70, 72 (9th Cir. 1980) (Title VII plaintiff showed vacancy when position became available one month after he applied); Smith v. Continental Ins. Corp., 747 F. Supp. 275, 283 (D.N.J. 1990) (plaintiff failed to make out prima facie case where there were no vacancies for three months after her application).

There is no evidence of a vacant kitchen and bath design position in the three months after plaintiff's December 1997 conversations with Mr. Barnish. With the reinstatement of Mr. Helm on December 1, 1997, one cannot reasonably infer from the record presented that there was any such vacant position again until mid-March of the following year.

Plaintiff never reapplied or contacted the Store to inquire about or express interest in future vacancies. See Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017 (5th Cir. 1990) (as period of time between application and subsequent

vacancy grows, need to follow-up application increases for purpose of showing plaintiff should have been considered for vacant position); EEOC. v. Metal Serv. Co., 892 F.2d 341, 348 (3d Cir. 1990) (Title VII plaintiff must make every reasonable effort to convey continuing interest in job when she did not formally apply to establish prima facie case); Kuchta v. Westinghouse Elec. Corp., 1992 WL 510994, *11 (W.D. Pa. Feb. 11, 1992) (ADEA plaintiff failed to establish vacancy for purpose of prima facie case when he did not re-contact potential employer to convey interest in newly vacant position).

Insofar as plaintiff suggests that he should have been considered for positions in other departments at the Store, he has produced no evidence of vacant positions in other departments within a reasonable time after his application for which he was qualified. See Amro v. Boeing Co., 232 F.3d 790, 797 (10th Cir. 2000) (Title VII plaintiff cannot establish prima facie case when he presents no evidence of specific vacant positions for which he was qualified); Reed v. Heil Co., 206 F.3d 1055, 1062 (11th Cir. 2000) (plaintiff with evidence of vacancies failed to establish prima facie case when he did not demonstrate he was qualified for those positions); Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999) (ADA plaintiff must specifically identify vacancy for which he is qualified and show it was available when he requested reassignment).

Moreover, there is no evidence that plaintiff applied for or expressed any interest in positions outside the Department. Plaintiff specifically expressed an interest in a kitchen and bath design position and applied only for that position. When plaintiff visited the Store on December 7, 1997, he asked only to speak to the head of the Department.

As plaintiff has not established that there were vacancies in positions for which he had expressed interest on December 7, 1997 or in the following three months, he also has not discredited defendant's proffered legitimate reason that he could not have been placed in a kitchen and bath design position on December 7th, the date of the alleged discriminatory action, or reasonably thereafter because none were then vacant.

ACCORDINGLY, this day of June, 2001, upon consideration of defendant’s Motion for Summary Judgment (Doc. #12), plaintiff’s response thereto and the record herein, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** in the above action for the defendant.

BY THE COURT:

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JAY C. WALDMAN, J.